

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BRYAN N. TAYLOR,

No. C 07-639 MHP (pr)

Plaintiff,

**ORDER GRANTING SUMMARY  
JUDGMENT FOR DEFENDANTS**

v.

PELICAN BAY; et al.,

Defendants.

**INTRODUCTION**

In this pro se prisoner's civil rights action, Bryan N. Taylor contends that his religious freedom rights were violated by staff at Pelican Bay State Prison. Defendants have moved for summary judgment, and plaintiff has opposed the motion. For the reasons discussed below, the court grants the motion and will enter judgment in defendants' favor.

**BACKGROUND**

The following facts are undisputed unless otherwise noted:

The events, acts, and omissions giving rise to Taylor's claims occurred between November 2005 and August 2007 at Pelican Bay State Prison.

At the relevant time, Bryan Taylor was an inmate at Pelican Bay. He was transferred to that prison from another unidentified institution on or about November 1, 2005. He was released from prison on May 4, 2008. For purposes of this motion, Taylor will be considered a member of the Seventh Day Adventist Church who followed a vegetarian diet for religious reasons.<sup>1</sup>

1 Defendants were employed at Pelican Bay. Defendant Bliesner was the Protestant  
2 chaplain at the prison. Defendants Olson, Lyon, Loftin, Stevenson, Gephart, George,  
3 Goudelock, Cardoza, Quam, Wadsworth and Gamboa were employed as correctional  
4 officers. They worked in the administrative segregation unit or general population units  
5 where Taylor was housed, and had duties that included issuing meal trays to Taylor and other  
6 inmates. Defendant Horel was the warden.

7 A. Procedure To Obtain A Religious Diet

8 The California Department of Corrections and Rehabilitation ("CDCR") had three  
9 diets for prisoners: a regular diet, a special religious diet, and a kosher diet. The special  
10 religious diet was a vegetarian diet designed for prisoners whose religions prescribed some  
11 kind of limited diet.

12 There was an established procedure for inmates to obtain a religious diet at Pelican  
13 Bay: The inmate would apply for a religious diet card by submitting an "inmate request for  
14 interview" form with the chaplain of the respective religion justifying his need for a special  
15 diet. The chaplain would then verify the inmate's affiliation with the religious group. If the  
16 inmate was approved, a religious diet card would be issued for him to receive a religious diet.  
17 After receiving the religious diet card, the inmate would show it in the dining hall to obtain  
18 the special religious diet. The chaplain also would forward a list of inmates approved to  
19 receive the special religious diet to the food services department. The food service manager  
20 would send the list to each supervising correctional cook. Each supervising correctional  
21 cook then would add the names of inmates served at the facility to a list of diets maintained  
22 at each dining room. (Although defendants refer to a "dining room," it appears that it was a  
23 food preparation room, and that inmates were served meals in their cells rather than in the  
24 dining room.)

25 Food service at each of the several Pelican Bay facilities was supervised by a  
26 supervising correctional cook, and each satellite dining room within each facility was staffed  
27 by a correctional officer. Inmate work crews assembled the meal trays at each dining room,  
28 and then put the prepared meal trays on hot carts. The number of inmates on the list for the

1 religious diet determined how many vegetarian trays were prepared and put on the hot carts.  
2 The hot carts were then delivered to the housing units. The vegetarian diet trays were  
3 marked as such on the tray lids, and were placed on top of the regular trays in the hot cart.

4 The housing officers at each housing unit issued meal trays according to dietary  
5 information kept for each inmate. Housing officers did not have discretion to provide an  
6 inmate with a meal tray other than the one assigned. If an inmate had a problem or a concern  
7 with the food he received, he could ask the housing officer to take the issue up with the  
8 kitchen officer. It was within the housing officer's discretion whether to address an inmate's  
9 issues with the kitchen officer. Defendant correctional officers' custom and practice was to  
10 take an inmate's issue up with the kitchen officer if it appeared that the inmate did not receive  
11 the appropriate meal under a valid food chrono.

12 When the housing unit received a religious diet chrono, a copy was posted in the  
13 housing unit office, and the information contained in the chrono was written on a board.  
14 Given the frequency with which they delivered food trays in their regularly assigned units,  
15 correctional officers usually memorized which inmates received religious diet trays and, if  
16 unfamiliar with the unit, the officer would write down the information and bring it during  
17 meal tray distribution. If an inmate received a regular diet tray and told the correctional  
18 officer that he was a vegetarian for religious reasons, the officer generally would instruct the  
19 inmate to submit an inmate request for interview to the chaplain for his religious group and  
20 request a special religious diet chrono.

21 B. Taylor's Application To Obtain A Religious Diet

22 Taylor states that he had been approved at another unidentified institution for a  
23 religious diet chrono since December 2003. There is no evidence that he presented a copy of  
24 that chrono to the chaplain at Pelican Bay, and it is not in the record submitted to this court.  
25 For purposes of this motion, the court accepts as true that Taylor had been approved at  
26 another institution for a religious diet. Regardless of what Taylor did or said about any  
27 approval at another facility, it is undisputed that he was informed of the procedure he had to  
28 follow to receive a religious diet at Pelican Bay.

1 Defendants Olson, Lyon, Loftin, Nichols, Stevenson, Gephart, George, Goudelock,  
2 Cardoza, Quam, Wadsworth, and Gamboa instructed Taylor on the proper procedure for  
3 applying for a special religious diet chrono. On November 14, 2005, the prison litigation  
4 coordinator responded to Taylor's request for information about a religious diet by directing  
5 him to contact chaplain Bliesner. Amended Complaint, Ex. 283.

6 On or about November 7, 2005, Taylor submitted an "inmate request for interview"  
7 form to chaplain Bliesner in which he stated: "Due to my religious convictions I do not eat  
8 meat. As is my 1st Amendment civil right. Please issue me a vegetarian chrono. If you can  
9 please come talk to me. Its urgent." Id. at Ex. 41. (A "chrono" is prison parlance for a  
10 memorandum, usually one that authorizes or prohibits something for a prisoner or staff.)

11 Chaplain Smith responded two days later: "Only Chaplain Bliesner is authorized to  
12 handle religious diet matters, and he is away from the Institution until December 2. Re-  
13 submit then." Id.

14 On December 3, 2005, Taylor submitted another inmate request form to chaplain  
15 Bliesner in which he stated that he had "been waiting for you to place me on the vegetarian  
16 list and send me a chrono." Bliesner Decl., Ex. 1. Taylor indicated that various other  
17 persons had left messages for Bliesner and that Taylor had "not gotten the actual chrono, in  
18 accordance with Deuteronomy 14 v. 8. I don't eat pork or meat." Id.

19 On December 20, 2005, chaplain Bliesner responded to Taylor's request by sending  
20 him a standard memorandum requesting additional information about the dietary habits of his  
21 religious group and contact information to help Bliesner verify Taylor's affiliation with the  
22 group. The memo explained the standards for authorizing religious diets and then instructed  
23 the inmate what he needed to do to get one:

24 [You] need to provide us with information about the dietary habits of your Religious  
25 Group. You also need to provide the address of your Religious Organization and the  
26 name of the Religious Contact Person(s) who can verify your Religion's Dietary  
27 Practices. Send me your documentation or credentials. [¶] If we receive verification  
28 of your personal association or involvement with a Religious group that teaches  
obligatory abstinence from meat, as a tenet of their faith, a Religious Dietary Chrono  
will be initiated. If your group is an established group that teaches abstinence from  
eating meat and we have them on file, it may not be necessary to notify the group if  
you can establish your knowledge of their Special Dietary practices.

Bliesner Decl., Ex. 2.

On December 29, 2005, Taylor filed an inmate appeal complaining that he had not been given the vegetarian diet to which he was entitled as a Christian. He pledged to go on a hunger strike until he received a vegetarian diet chrono. Bliesner Decl., Ex. 4.

On January 4, 2006, Taylor sent to Bliesner an inmate request form that stated: "I am a Christian and in accordance with Deuteronomy 14 verse 8 of the bible, I do not eat meat. Would you please issue me a vegetarian chrono." Bliesner Decl., Ex. 3.

Taylor's December 29 inmate appeal was denied on January 6, 2006 by chaplain Bliesner, who referred Taylor to the December 20, 2005 memorandum that described the procedure to follow for requesting a religious diet. Bliesner quoted part of the earlier memorandum that explained the steps to take to request a religious diet. Bliesner then wrote:

In your appeal you state that you are a Christian. I am unaware of any Christian groups that teach that it is obligatory for it's (sic) followers to abstain from eating meat or poultry. If this appeal is a response to the December 20, 2005 memorandum that I sent to you, I could not find in your response any verification that you are eligible to receive a Special Religious Diet. I would like to assist you in this matter but to this date you have not provided me with any documentation or an address or phone number of your Religious Organization and the name of a contact person so I can verify their dietary practices.

Bliesner Decl., Ex. 5.

On January 10, 2006, Taylor informed Bliesner that he was a Seventh Day Adventist. Bliesner Decl., Ex. 6. Bliesner then placed Taylor on the special religious diet list and sent to Taylor a copy of the special religious diet chrono issued for him on January 13, 2006.

Bliesner Decl., Ex. 7.

#### C. Problems With The Religious Diet Service

After the religious diet chrono was issued for Taylor on January 13, 2006, he made occasional complaints about shortcomings in the meals delivered to him. Taylor has presented evidence that the following problems occurred in the food service for him on the following days:

/ / /

<u>Date:</u>	<u>Complaint:</u>
March 9, 2006	Fish was not on tray, and jello was on tray.
March 13-16, 2006	Fruit and coffee were not on tray.
May 1, 2006	Bread was not on tray.
May 8, 2006	Peanut butter or cheese was not on lunch tray.
May 29, 2006	Coffee was not on tray. <sup>2</sup>
June 11, 2006	No breakfast tray.
July 5, 2006	Cake crumbs rather than intact coffee cake were on tray.
July 13, 2006	Cheese was not on tray.
July 28, 2006	Unidentified item was not on breakfast tray
July 30, 2006	Extra eggs or hash browns were not on tray.
Sept. 28, 2006	Beans were not on tray.
Oct. 2, 2006	Peanut butter or cheese was not on tray.
Oct. 5, 2006	Peanut butter was not on breakfast tray.
Oct. 21, 2006	Beans were not on tray.
Nov. 14, 2006	Mayonnaise packet, pear, and cookie were not on lunch tray.
Nov. 14, 2006	Cheese was not on dinner tray.
Nov. 27, 2006	Regular breakfast tray with meat on it was served.
Dec. 9, 2006	Peanut butter was not on breakfast tray.
Feb. -, 2007	Fish was not on tray one day.
May 5, 2007	Beans were not on tray.
May 21, 2007	Vegetables were not on dinner tray.
May 31, 2007	Beans were not on tray.
June 1, 2007	Peanut butter was not on tray.

Taylor apparently determined that items were missing by comparing his tray to the printed food service menus. The sample menu he provided stated that items could be substituted for the listed menu items at the institution's discretion. Amended Complaint, Ex. 313.

In many instances, Taylor filed inmate appeals on the day he received a meal tray that was deficient in any respect. See, e.g., id. at Exs. 52, 54, 56, 58, 63, 64, 94. Sometimes, he mentioned the missing items to the correctional officer dispensing the meal tray but, according to him, the officer would not go to the kitchen to obtain the missing item. When Taylor was interviewed for one of his inmate appeals about the vegetarian diet problems, he threatened to file a court action unless compensated with a television and a radio. Id. at Exs. 77, 222.

Taylor also filed inmate appeals on several occasions when his meal trays were served late to him. See, e.g., id. at Exs. 55 ("every time" a particular correctional officer worked, Taylor received his breakfast and lunch late), 95 (health request form stating he was "stressed out" because cheese for lunch tray was brought to him 2 hours after his breakfast); 278 (undated letter complaining that he was not served breakfast until 15 hours after dinner was

1 served); 263 (serving breakfast and dinner up to two hours late was "inhumane treatment").

2 Taylor also went on short hunger strikes from time to time when he was dissatisfied  
3 with the food served to him, believing that his complaints would be heard by someone higher  
4 in the chain of command if he went on a hunger strike. See, e.g., id. at Exs. 61 (complaining  
5 that he wasn't seen by a doctor despite his 5-day hunger strike in May 2006); 80 (announcing  
6 planned hunger strike in November 2005); 86-88 and 92 (hunger strike writings demanding  
7 vegetarian food and other things but not mentioning religious basis for his demand for  
8 vegetarian diet); 234 (letter to Madrid special master about hunger strike that lasted up to  
9 four days before January 4, 2006). Prison officials apparently were skeptical of at least one  
10 hunger strike and searched Taylor's cell after he skipped meals for two days; they found at  
11 least 100 packages of ramen noodles. Id. at Ex. 144. Taylor vowed that he was "not eating  
12 any of the 131 top ramen soups in [his] cell" during his hunger strike. Id. at Ex. 92.  
13 Apparently, a prison procedure provided for a medical check when a prisoner skipped meals  
14 for three days; Taylor was irritated when he did not receive the prescribed medical checks,  
15 although he never indicated any particular need for medical attention.

## 16 VENUE AND JURISDICTION

17 Venue is proper in the Northern District of California because the events or omissions  
18 giving rise to the claims occurred in Del Norte County, which is located within the Northern  
19 District. See 28 U.S.C. §§ 84, 1391(b). This Court has federal question jurisdiction over this  
20 action brought under 42 U.S.C. § 1983. See 28 U.S.C. § 1331.

## 21 LEGAL STANDARD FOR SUMMARY JUDGMENT

22 Summary judgment is proper where the pleadings, discovery and affidavits show that  
23 there is "no genuine issue as to any material fact and [that] the moving party is entitled to  
24 judgment as a matter of law." Fed. R. Civ. P. 56(c). A court will grant summary judgment  
25 "against a party who fails to make a showing sufficient to establish the existence of an  
26 element essential to that party's case, and on which that party will bear the burden of proof at  
27 trial . . . since a complete failure of proof concerning an essential element of the nonmoving  
28 party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477



1 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of the lawsuit  
2 under governing law, and a dispute about such a material fact is genuine "if the evidence is  
3 such that a reasonable jury could return a verdict for the nonmoving party." Anderson v.  
4 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

5 Generally, the moving party bears the initial burden of identifying those portions of  
6 the record which demonstrate the absence of a genuine issue of material fact. The burden  
7 then shifts to the nonmoving party to "go beyond the pleadings, and by his own affidavits, or  
8 by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts  
9 showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (citations omitted).  
10 When the moving party bears the burden of proof and persuasion on an issue at trial, it must  
11 at summary judgment "show that 'the evidence is so powerful that no reasonable jury would  
12 be free to disbelieve it.'" Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008).

13 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it  
14 is based on personal knowledge and sets forth specific facts admissible in evidence. See  
15 Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's  
16 verified complaint as opposing affidavit where, even though verification not in conformity  
17 with 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and  
18 correct, and allegations were not based purely on his belief but on his personal knowledge).  
19 Whether the amended complaint should count as evidence under this rule is questionable in  
20 light of the language of Taylor's verification, which literally only verified his signature and  
21 the date, rather than the contents of the amended complaint. For purposes of this motion, the  
22 court will assume without deciding that plaintiff's amended complaint is evidence.

23 The court's function on a summary judgment motion is not to make credibility  
24 determinations or weigh conflicting evidence with respect to a disputed material fact. See  
25 T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The  
26 evidence must be viewed in the light most favorable to the nonmoving party, and the  
27 inferences to be drawn from the facts must be viewed in a light most favorable to the  
28 nonmoving party. See id. at 631.



**DISCUSSION****A. Religion Claim**

The First Amendment guarantees the right to the free exercise of religion. “The free exercise right, however, is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security.” O’Lone v. Shabazz, 482 U.S. 342, 348 (1987). In order to establish a free exercise violation, a prisoner must show a defendant burdened the practice of his religion without any justification reasonably related to legitimate penological interests. See Shakur v. Schriro, 514 F.3d 878, 883-84 (9th Cir. 2008).

The Supreme Court has identified four factors for courts to consider when determining whether a regulation or practice is reasonably related to legitimate penological interests: (1) whether there is a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it”; (2) “whether there are alternative means of exercising the right that remain open to prison inmates”; (3) “the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally”; and (4) the “absence of ready alternatives,” or, in other words, whether the rule at issue is an “exaggerated response to prison concerns.” Turner v. Safley, 482 U.S. 78, 89-90 (1987). The factors are considered to determine whether the state shows a “reasonable” relation between the policy and legitimate penological objectives, rather than simply a “logical” one. Beard v. Banks, 548 U.S. 521, 533 (2006). While all justifiable inferences must be drawn in the prisoner-plaintiff's favor with respect to matters of disputed fact, in disputed matters of professional judgment the court’s inferences must accord deference to the views of prison authorities. See id. at 529-30. Unless a prisoner can point to evidence showing the policy is not reasonably related to legitimate penological objectives, sufficient to allow him to prevail on the merits, he cannot prevail at the summary judgment stage. Id. at 530.

Inmates "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." Ward v. Walsh, 1 F.3d 873, 877 (9th

1 Cir. 1993) (internal quotation and citation omitted). The refusal to provide a healthy diet  
2 conforming to sincere religious beliefs therefore may violate the First Amendment. To  
3 analyze an inmate's claim that he has been denied the right to food that satisfies the dietary  
4 laws of his religion, the court applies the Turner test mentioned above.

5 For a claim under the Religious Land Use and Institutionalized Persons Act  
6 ("RLUIPA"), 42 U.S.C. § 2000cc-1, the plaintiff-prisoner must show that the government has  
7 imposed a substantial burden on his religious exercise. A "'substantial burden' on 'religious  
8 exercise' must impose a significantly great restriction or onus upon such exercise." San Jose  
9 Christian College v. Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

10 Taylor complains of two different problems: obtaining permission to get into the  
11 religious diet program and the delivery of that religious diet once he made it into the  
12 program.

13 Taylor has failed to show a triable issue of fact on his claim that his First Amendment  
14 rights were violated by the requirement that he first identify his religion to enable the  
15 chaplain to verify the claimed need for a religious diet. It is undisputed that chaplain  
16 Bliesner did not deny the request for a religious diet, and instead granted it after Taylor  
17 provided the requested information. Thus, cases concerning the denial of a religious diet are  
18 of very limited help in considering Taylor's claim. Instead, his claim appears much closer to  
19 the claim considered in Resnick v. Adams, 348 F.3d 763 (9th Cir. 2003), in which the dispute  
20 was about the procedures an inmate had to follow to obtain a religious diet. The court in  
21 Resnick considered the four Turner factors and concluded that requiring an inmate to fill out  
22 an application to obtain a special religious diet did not violate the inmate's rights under the  
23 First Amendment or RLUIPA. See Resnick, 348 F.3d at 771. That parallels the situation  
24 here. Pursuant to the established procedure at Pelican Bay, chaplain Bliesner required Taylor  
25 to identify his religion so that Bliesner could check whether the requested diet was part of  
26 that religion's requirements. Requiring Taylor to apply and to identify for the chaplain his  
27 particular religion before admitting him to the religious diet program passed muster under the  
28 Turner factors. First, the prison had a legitimate governmental interest in the orderly

1 administration of the prison's diet program to accommodate the religious dietary needs of  
2 many prisoners. See Resnick, 348 F.3d at 769; see also Ward, 1 F.3d at 877. Taylor cannot  
3 show that he would not have been provided with a religious diet had he provided the  
4 information required by established procedures – indeed, he was given a religious diet  
5 chrono once he provided the information required (i.e., by identifying his particular religion  
6 as Seventh Day Adventist). Second, Taylor had many alternative means by which he could  
7 practice his Seventh Day Adventist religion, such as prayer, participation in religious  
8 observances, and modest behavior that accorded with the religion's belief system. See Ward,  
9 1 F.3d at 877. Third, accommodating an inmate who did not want to apply for a religious  
10 diet or provide the required information about his religion would have a significant impact in  
11 that it would frustrate the orderly operation of the prison's religious diet program.  
12 See Resnick, 348 F.3d at 770. Fourth, "[i]t is difficult to think of any alternatives more  
13 'obvious' and 'easy' than simply requiring each inmate seeking a religious diet to fill out the  
14 standard . . . application form." Id. Requiring Taylor to identify his religion and its dietary  
15 habits, as well as providing the name of a contact at the religious organization was, at most, a  
16 slight burden on his right to religious freedom. That he had already received a chrono at  
17 another institution at which he had been housed previously did not undermine the propriety  
18 of chaplain Bliesner confirming Taylor's religious affiliation again at Pelican Bay –  
19 especially since there is no evidence that Taylor provided a copy of that old chrono to  
20 Bliesner. Cf. McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987) (faulting prison official  
21 for slipshod investigation and reliance on second-hand information about inmate's past  
22 behavior to determine whether he should receive kosher diet at different prison). The  
23 undisputed evidence is that once Taylor went beyond identifying himself as a Christian who  
24 didn't eat meat and stated that he was a Seventh Day Adventist, it was only a few days before  
25 chaplain Bliesner issued a religious diet chrono for him. Bliesner's request that Taylor  
26 specify his religion more than simply being "Christian" was not unduly burdensome in light  
27 of the evidence that the "Seventh Day Adventist religion is the only Christian group that  
28 traditionally followed a vegetarian diet." Bliesner Decl., ¶ 7.

1 Viewing the evidence in the record in the light most favorable to Taylor, no  
2 reasonable jury could find in his favor on his claim that having to apply for permission to get  
3 into the religious diet program at Pelican Bay violated his religious freedom rights under the  
4 First Amendment.

5 The second issue presented concerns problems with the delivery of that religious diet  
6 once Taylor was approved for the religious diet program. Taylor has not shown a triable  
7 issue of fact with regard to his claims against defendants who occasionally served him meals  
8 that were missing one or more items that should have been on the meal trays, nor with regard  
9 to his claim against warden Horel to whom he wrote letters complaining about the problems  
10 he experienced. In the relevant time – between his transfer to Pelican Bay on November 1,  
11 2005, and the filing of his amended complaint on August 19, 2007 – Taylor was served  
12 approximately 1,950 meals. He has presented evidence that on approximately 25 occasions  
13 during that time he received less than a complete meal tray. This means that about once  
14 every 78 meals (or 1.3% of the time) something was amiss. These occasional missing items  
15 are the sort of "relatively short-term and sporadic" intrusions that do not amount to a  
16 substantial burden on the prisoner's First Amendment free exercise rights, see Canell v.  
17 Lightner, 143 F.3d 1210, 1215 (9th Cir. 1998), or RLUIPA rights, see generally San Jose  
18 Christian College, 360 F.3d at 1034 (9th Cir. 2004). Not only were the incomplete meals  
19 occurring very infrequently, no particular defendant served all the deficient meals and none  
20 of the defendants did the actual preparation of the meals. it is undisputed that the vegetarian  
21 meals were prepared by inmate workers and then loaded on hot trays, from which they were  
22 dispensed by some of the defendants. There is no evidence that Taylor's meals were marked  
23 as destined for him individually, so that he would receive the next vegetarian meal available  
24 from the hot cart when he was served. Taylor presented evidence that he did often alert the  
25 food service officers to shortcomings on the meal trays when he discovered them and that he  
26 usually did not obtain the missing item. However, it remains the case that the incomplete  
27 trays occurred infrequently and that the defendant officers distributed meals that they had not  
28 made. Viewing the evidence in the record in the light most favorable to Taylor, no

1 reasonable jury could find in his favor on his religious freedom claims against defendants for  
2 the occasional failure of the meal trays to include all the items that should have been on the  
3 religious diet food tray.

4 In their motion for summary judgment, defendants argue that Taylor's claim about the  
5 missing food items really goes to a medical concern rather than a religious concern. The  
6 court understood the gist of the amended complaint to be claim of infringement on religious  
7 freedoms, and that is the claim the court ordered served on defendants. Taylor did not object  
8 to that characterization in the order of service and did not argue a medical claim in his  
9 opposition to the motion for summary judgment. That is not surprising, as an Eighth  
10 Amendment claim would plainly fail. The infrequency of the incidents (i.e., mistakes in only  
11 about 1.3% of the meals) and the fact that all but one of the incidents concerned a missing  
12 item from a meal rather than a completely missing meal would spell doom for any Eighth  
13 Amendment claim. The denial of food service can present a sufficiently serious condition to  
14 meet the objective prong of the Eighth Amendment deliberate indifference analysis, but not  
15 every missed meal amounts to an objectively serious condition. See Foster v. Runnels, 554  
16 F.3d 807, 812-13 (9th Cir. 2009). The Foster court found that the denial of 16 meals over 23  
17 days was "a sufficiently serious deprivation because food is one of life's basic necessities,"  
18 but that the denial of 2 meals over 9-week period was not sufficiently serious to meet  
19 objective prong of Eighth Amendment deliberate indifference. Id. at 812. Taylor's brief  
20 hunger strikes may have resulted in several missed meals in a row, but those were self-  
21 imposed missed meals, and not conditions that could be said to be caused by defendants.  
22 Taylor's situation was nowhere near the almost-daily missed meals that Foster found to be an  
23 objectively serious condition necessary for an Eighth Amendment violation.

24 B. Qualified Immunity Defense

25 The defense of qualified immunity protects "government officials . . . from liability  
26 for civil damages insofar as their conduct does not violate clearly established statutory or  
27 constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald,  
28 457 U.S. 800, 818 (1982). The rule of qualified immunity "provides ample protection to all

1 but the plainly incompetent or those who knowingly violate the law.'" Burns v. Reed, 500  
2 U.S. 478, 495 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

3 In determining whether the defendants are entitled to qualified immunity, the usual  
4 first step is to answer this threshold question: "Taken in the light most favorable to the party  
5 asserting the injury, do the facts alleged show the officer's conduct violated a constitutional  
6 right?" Saucier v. Katz, 533 U.S. 194, 194 (2001). If no constitutional right was violated if  
7 the facts were as alleged, the inquiry would end and the defendants prevail. As discussed  
8 above, the evidence in the record does not raise a triable issue of fact that there was a  
9 violation of Taylor's religious freedom rights. The inquiry thus ends and defendants prevail  
10 on their qualified immunity defense.

### 11 CONCLUSION

12 Defendants' motion for summary judgment is GRANTED. (Docket # 43.) Plaintiff  
13 filed a motion for summary judgment in which he made his arguments in opposition to  
14 defendants' motion. Plaintiff's motion for summary judgment is DENIED (Docket # 71)  
15 because he is not entitled to judgment in his favor. The court has, however, considered the  
16 arguments therein as an opposition to defendants' motion for summary judgment.

17 IT IS SO ORDERED.

18 Dated: July 1, 2010

  
Marilyn Hall Patel  
United States District Judge

**NOTES**

1. It is somewhat unclear whether Taylor was a member of the Seventh Day Adventist Church, but for purposes of the present motion the court assumes he was. The lack of clarity is due to his own statements, in which he typically identified himself as a Christian and cited a particular passage from the book of Deuteronomy in the Bible, i.e., Deuteronomy 14:8, which states "And the swine, because it divideth the hoof, yet cheweth not the cud, it is unclean unto you: ye shall not eat of their flesh, nor touch their dead carcase." See, e.g., Bliesner Ex. 1 ("in accordance with Deuteronomy 14v.8 I don't eat pork or meat"); id. at Ex. 3 ("I am a Christian and in accordance with Deuteronomy 14 verse 8 of the bible, I do not eat meat."); id. at Ex. 4, p. 1 ("Because of my religious beliefs I do not eat meat. I am a Christian and in accordance with the word of God himself I do not eat meat, especially pork. Please see Deuteronomy 14 verse 8."); id. at Ex. 4., p. 2 ("I am a Christian which is an established religious group. As a Christian it is my duty to obey the word of God. Deuteronomy chapter 14 verse 8 God clearly says do not eat of the swine Daniel chapter 1 verse 12-17 and Matthew chapter 14 verse 18-20 also support. This a vegetarian diet."); Amended Complaint, p. 1 (was approved for a religious diet "because of his religious beliefs plaintiff shares in common with 7th Day Advantis") (errors in source). Only when pressed did he specify that he was a Seventh Day Adventist. See Bliesner Decl., Ex. 6 ("As a 7th Day Adventus, I do not eat pork or meat in accordance with Deuteronomy 14 v.8 of the Bible.")

2. Taylor's complaint that he did not receive coffee on occasion is somewhat perplexing in light of his statement that he did not consume coffee. See Amended Complaint, p. 9.